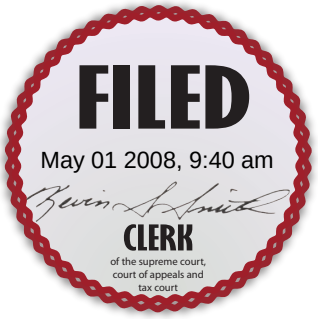

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IN THE
COURT OF APPEALS OF INDIANA

FRANKIE A. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0710-CR-895
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0601-FD-00015

May 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his plea of guilty to battery resulting in bodily injury, resisting law enforcement, and residential entry, all Class D felonies, Johnson appeals his aggregate sentence of three years. Specifically, Johnson argues that the trial court failed to give sufficient weight to the mitigators it did find, that the trial court failed to consider as mitigators his remorse and improved character since his arrest in this case, and that his sentence is inappropriate. Because Johnson can not challenge the weight of the mitigators, the trial court did not abuse its discretion in failing to identify additional mitigators, and Johnson has failed to persuade us that his sentence is inappropriate, we affirm.

Facts and Procedural History

On January 9, 2006, the State charged Johnson with battery resulting in bodily injury, resisting law enforcement, and residential entry, all Class D felonies. The State later added a count alleging that Johnson was a habitual offender. On June 11, 2007, Johnson pled guilty to all three Class D felonies, and in exchange the State dismissed the habitual offender count.[1] According to the plea agreement, the sentences on the three counts would run concurrently; otherwise, Johnson's sentence was "open to the Court." Appellant's App. p. 21. According to the factual basis presented by the State,

> [O]n or about January 7th, 2006 Officer from the Edgewood Police Department received a dispatch indicating that a plain clothed officer was at a gas station, at a Ricker's gas station in Lapel and had observed the defendant, Frankie A. Johnson, who he knew to have a warrant out of Hamilton County. That officer then responded, who was in uniform in a

[1] In this same plea agreement, Johnson pled guilty to nonsupport of a dependent under Cause No. 48D03-0602-FC-55. Johnson also appeals his sentence in that case. *See Johnson v. State*, 48A04-0710-CR-586 (Ind. Ct. App. May 1, 2008).

> vehicle—that officer advised when he located the vehicle he attempted to make a traffic stop in the area of Layton Road and State Road 32 in Madison County. He existed [sic] the vehicle and approached the driver's side door. When he got [to] the driver's side door, he noticed that the driver had looked away from him and then had dr[i]ve[n] away. Captain Elling—the officer, who was Captain Ellingwood, who had r[u]n back to his vehicle and pursued the vehicle with his emergency lights and siren on. The suspect vehicle drove east on State Road 32 and then lead [sic] to a high speed chase, where eventually he got out and ran and was followed by Captain Ellingwood. At one point the suspect ran up to the front door at 1820 Euclid Drive. And while he was trying to get into the residence, Captain Ellingwood stated that he sprayed the subject [with] pepper spray, again there was a fight. Eventually the suspect got into the residence of Rateria Leonard without her permission while he [was] being chased by the officer. Once again, during this chase and when the officer while trying to apprehend him, he was struck by the defendant after the pursuit was over.

Tr. p. 6-8.

At the sentencing hearing, the trial court identified as aggravators Johnson's prior criminal history, which the court found to be "substantial" and consisting of similar types of offenses that were committed "year after year," *id.* at 43, and the charges pending against Johnson in Hamilton County for offenses occurring in 2003. As for mitigating circumstances, the trial court identified Johnson's guilty plea and the fact that he was employed and able to make restitution.[2] Finding that the aggravators outweighed the mitigators, the trial court sentenced Johnson to an above-advisory term of three years on each count and ordered them to be served concurrently. The trial court ordered the sentence in this case to be served consecutive to Johnson's three-year sentence in Cause No. 48D03-0602-FC-55. Johnson now appeals his sentence.

[2] We note that the trial court's oral sentencing statement is more thorough than its written sentencing order. *Compare* Tr. p. 43-45 *with* Appellant's App. p. 24.

Discussion and Decision

Johnson raises several issues on appeal. First, he contends that the trial court failed to give sufficient weight to the mitigators. Second, Johnson contends that the trial court failed to consider as mitigators his remorse and improved character since his arrest in this case. Finally, he contends that his sentence is inappropriate.

I. Weight of Mitigators

First, Johnson contends that the trial court erred by failing to give sufficient mitigating weight to his guilty plea and ability to make restitution. Although sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion, *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), our Supreme Court clarified in *Anglemyer* that a trial court can not now be said to have abused its discretion in failing to properly weigh aggravators and mitigators. *Id.* at 491. Accordingly, Johnson's challenge fails.

II. Failure to Identify Mitigators

Johnson next contends that the trial court erred in failing to identify as mitigators his remorse and improved character since his arrest in this case. An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the court is not obligated to explain why it has not found that mitigator. *Id.*

As for his remorse, Johnson testified at the sentencing hearing that he was sorry for what he did and that he was a changed man. At the conclusion of the sentencing hearing, the trial court identified as a mitigator that Johnson pled guilty. Thus, by considering his guilty plea as a mitigator, the trial court took into account Johnson's remorse. To the extent that the trial court did not separately identify Johnson's remorse as a mitigator, the Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* We find no impermissible considerations here and, therefore, no error in failing to recognize this mitigator.

As for Johnson's claimed improved character since his arrest in this case, Johnson and his wife testified at the sentencing hearing that he was currently employed, attended church, and was actively involved in his children's lives. At the conclusion of the sentencing hearing, the trial court identified as a mitigator that Johnson was currently employed and thus able to make restitution to the police officer, who had to replace his uniform. Thus, the trial court took into consideration Johnson's character when sentencing him. Johnson asserts, however, that his improved character also proves that he is unlikely to commit another crime and that he would respond affirmatively to probation or short term imprisonment. Given Johnson's extensive criminal history, detailed below, and the lack of nexus between the two, the trial court did not abuse its

discretion by failing to identify as mitigators that Johnson is unlikely to commit another crime and that he would respond affirmatively to probation or short term imprisonment.

III. Inappropriate Sentence

Finally, Johnson contends that his three-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Johnson, who had an outstanding warrant for his arrest, led the police on a high-speed chase then fled from the police on foot. Johnson then entered a residence without permission and struggled with the officer. As for the character of the offender, although Johnson did not include his PSI report in his appendix, the prosecutor stated at the sentencing hearing that according to his review of Johnson's PSI, Johnson had thirteen convictions as an adult, five of which were for felonies, and eight juvenile adjudications. The trial court stated that Johnson's criminal history was "substantial" and consisted of similar types of offenses that were committed "year after year" and "time after time." Tr. p. 43. In addition, the trial court ordered the sentence in

this case to be served consecutive to Johnson's three-year sentence in Cause No. 48D03-0602-FC-55 for Class D felony nonsupport of a dependent child. At the time of sentencing in this case, Johnson had charges pending against him in Hamilton County for offenses occurring in 2003. Johnson appears to argue that the fact that he lost a finger during the instant crimes somehow speaks positively of his character. While it is unfortunate that Johnson lost a finger, this accident was the result of Johnson's own wrongdoing. Although Johnson pled guilty, was employed at the time of sentencing, and claims to have made some positive changes in his life, these factors are overshadowed by his undeterred criminal history. Johnson has failed to persuade us that his three-year sentence in this case is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.